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No. 91-1522

IN THE SUPREME COURT OF THE UNITED STATES

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FILED
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OCTOBER TERM, 1991

WILLIAM J. HABERSTROH,
DISTRICT ATTORNEY OF BLAIR COUNTY,
PENNSYLVANIA, et al.,
Petitioners

v.

WAYNE PAUL BURKETT,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF AMICUS CURIAE MISSISSIPPI AND OTHER AMICI LISTED ON THE INSIDE COVER* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

The Petitioner presents the following questions:

1. Does the Sixth Amendment's Speedy Trial Clause apply not only to delay before a criminal trial, when the defendant is presumed innocent, but also to proceedings after he has been found guilty?

2. May a court find a constitutional violation where the post-trial delay was neither intended to nor resulted in prejudice to the defendant's ability to proceed at sentencing or on appeal?

3. May a court remedy any such violation by directly reducing the defendant's sentence in proportion to the length of the delay?

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INTEREST OF AMICI CURIAE

Amici curiae are States, each of which views the unwarranted expansion of the writ of habeas corpus by lower federal courts, as a threat to the integrity of state criminal justice systems caused by the erosion of the finality of state-imposed judgments of sentence. The decision of the Third Circuit Court of Appeals, reducing the habeas corpus petitioner's state-imposed sentence of imprisonment by thirty-nine months on account of delay in post-conviction proceedings, constitutes an egregious example of that threat come to fruition.

The decision of the Third Circuit is premised upon a faulty constitutional analysis, which this Court should correct. The case presents an important vehicle for the Court to clarify the proper role of federal courts in reviewing claims of

post-conviction delay asserted by state prisoners. The amici States believe that delay in post-conviction proceedings is not governed by the Sixth Amendment's Speedy Trial Clause. Moreover, the States believe that no matter what analysis is applied, a state prisoner should be required to establish a nexus between the delay and his ability to proceed at sentencing or on appeal in order to be entitled to any relief.

Accordingly, the amici States urge this Court to review the Court of Appeals decision in Burkett v. Fulcomer, 951 F.2d 1431 (3d Cir. 1991).

SUMMARY OF ARGUMENT

This case presents the question of the proper role, if any, of the federal court when a state prisoner seeks habeas corpus relief due to delay in post-conviction proceedings. This Court has never definitively determined whether the Constitution provides a vehicle to remedy such delay. The Third Circuit's application of a Sixth Amendment Speedy Trial Clause analysis to post-conviction proceedings was not required by the Constitution or by this Court's precedent. Such an analysis is simply inapplicable after trial.

Having improperly couched its analysis of the post-conviction delay in constitutional terms, the Court of Appeals crafted a remedy--sentence reduction proportionate to the delay--which displaces a legal state sentence imposed upon a crimi-

nal, who has already received credit against his sentence "for the prison time served post-arrest" 951 F.2d at 1436, n.5, and whose substantive challenges to his conviction have all been determined to be meritless.

This Court should grant review to correct the Third Circuit's decision which erodes the finality of judgments of sentence by shortening a dangerous criminal's incarceration contrary to the public interest, and which provides the criminal with a undeserved windfall.

ARGUMENT

1. The amici States recognize the need to resolve all phases of criminal proceedings expeditiously. The Sixth Amendment ensures that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial...."

U.S. Const. Amend. VI. The requirement of a speedy trial does not stand alone in the Constitution. It is part and parcel of the full panoply of safeguards protecting those presumed innocent. "[I]n large measure because of the many procedural safeguards provided an accused, the ordinary procedures for criminal prosecution are designed to move at a deliberate pace. A requirement of unreasonable speed would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself." United States v. Ewell, 383 U.S. 116, 120 (1966) "The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice." Beavers v. Haubert, 198 U.S. 77, 87 (1905).

The respondent, Wayne Paul Burkett, received the benefit of each and every procedural safeguard to which he was entitled at trial. The Third Circuit agreed with the state trial and appellate courts that no error required retrial. See Burkett v. Fulcomer, 951 F.2d 1431, 1448-1449 (3d Cir. 1991) (evidence sufficient to prove beyond a reasonable doubt that Burkett entered victim's dwelling with specific intent to commit rape,[1] where "perpetrator described sexual acts which the victim was to perform, wielded a knife, and unzipped his pants"; evidence sufficient to convict of recklessly endan-

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[1]In Wright v. West, No. 91-542, 931 F.2d 262 (4th Cir. 1991), cert. granted, 112 S.Ct. 656 (1991) and 112 S.Ct. 672 (1991), this Court is presently considering the appropriate role of federal courts in reviewing the state court's application of law to the specific facts of a state prisoner's case in a habeas corpus proceeding.

gering, where Burkett "brandished a knife and threatened to slit the throat of the victim"; identification evidence admitted consistent with due process where victim had prolonged face-to-face encounter with defendant.)

The Court of Appeals granted Burkett's request for habeas corpus relief, not on a finding of a constitutional violation at trial, but rather on a finding that the cumulative impact of delays in sentencing and appeal disposition caused Burkett to "suffer[] the deprivation of a constitutional right." 951 F.2d at 1431. To reach this conclusion, the Court of Appeals applied the Sixth Amendment Speedy Trial Clause to sentencing delay and applied a Sixth Amendment analysis, under the rubric of the Due Process Clause, to appellate delay. In short, the Court of

Appeals applied Barker v. Wingo, 407 U.S. 514 (1972) to post-conviction delay.

The Speedy Trial Clause analysis set forth in Barker was not designed to be applied to the period after trial and it does not suit that purpose.

The only time this Court considered the question of whether the rights guaranteed by the Speedy Trial Clause extend beyond the fact-finder's guilty verdict was in Pollard v. United States, 352 U.S. 354 (1957). In Pollard, the Court "assume[d] arguendo that sentence is part of the trial for purposes of the Sixth Amendment." Id. at 361. However, the Court found the two year delay in sentencing in Pollard did not require a remedy. "Whether delay in completing a prosecution such as here occurred amounts to an unconstitutional deprivation of rights depends upon the circumstances. See e.g. Beavers v.

Haubert, 198 U.S. 77, 87; Frankel v. Woodrough, 7 F.2d 796, 798 [8th Cir. 1925]. The delay must not be purposeful or oppressive. It was not here."[2]

The Petitioner points out that the assumption in Pollard has been viewed as established law by a number of state and federal courts without resort to the text of the Constitution or any exposition of rationale. (See Pet. at pp. 20-23, nn. 4-7)

Pollard, however, left open the question of the Speedy Trial Clause's applicability to the period after conviction. A number of well-reasoned decisions by state appellate courts have rejected both the

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[2]The four dissenters in Pollard did so because the sentencing procedure did not conform to the Federal Rules of Criminal Procedure, not on the basis of the Sixth Amendment. "[I]t is not necessary to decide this issue on constitutional grounds." Id. at 368 (dissent).

Pollard assumption as well as the applicability of a Barker analysis after conviction. Holding that the guarantee of a speedy trial does not extend to sentencing, the Supreme Court of Louisiana opined:

> When the words are given their fair import in connection with the context, both clauses [state and federal speedy trial clauses] are properly construed as referring to the adversary hearing that determines guilt or innocence. By its terms, the Sixth Amendment applies to an accused. See Dillingham v. United States, 423 U.S. 64; United States v. Marion, 404 U.S. 307 (1971). It refers "to a speedy and public trial, by an impartial jury." The Amendment later assures the right to be confronted by the witnesses and the right to compulsory process to secure the witnesses....None of the language in either clause is relevant to sentencing.

State v. Johnson, 363 So.2d 458, 460 (La. 1978). See also Pet. at p. 24, n. 8 (collecting state cases which have declined to

extend the speedy trial guarantee beyond the end of trial).

As correctly noted in Johnson, "[o]ther principles support the view that sentencing is not part of the traditional notion of trial. The term 'trial' is defined as the proceedings to determine a defendant's guilt or innocence, commencing with the empaneling of the jury and ending with a rendition of the verdict." Id., at 461.

Moreover, extension of the speedy trial guarantee to post-conviction proceedings would not further the considerations underlying the guarantee:

> Three considerations underlie the right to a speedy trial: to prevent undue and oppressive incarceration prior to trial; to minimize anxiety and concern accompanying public accusation; and to limit the possibilities that long delay will impair the ability of an accused to defend himself. Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33

> L.Ed.2d 101 (1972); United States v. Marion, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971); United States v. Ewell, 383 U.S. 116, 86 S.Ct. 773, 15 L.Ed.2d 627 (1966). None of these concerns apply to a delay between conviction and sentencing. Brooks v. United States, 423 F.2d 1149 (8th Cir. 1970); State v. Drake, Iowa, 259 N.W.2d 862 (1977); Erbe v. State, 276 Md. 541, 350 A.2d 640 (1976), quoting from Erbe v. State, 25 Md.App. 375, 336 A.2d 129 (1975). Obviously, the evils of lengthy pretrial detention and impeded trial defenses are irrelevant after conviction. The factor of anxiety of the accused refers to a presumptively innocent defendant who must live under a cloud of suspicion until he has an opportunity to establish his innocence. Erbe v. State, supra.

State v. Johnson, id. at 461.

Under Barker, the speedy trial claim is determined by assessment of four factors: "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." 407 U.S. at 514. (Footnote omit-

ted.) The anomalous result caused by lifting Barker from the trial context and applying it post-conviction is demonstrated here.

In its first consideration of Burkett's claim for relief, the Third Circuit found the length of the post-conviction delay was not sufficient to excuse the statutory requirement that Burkett exhaust his state remedies. Burkett v. Cunningham, 826 F.2d 1208, 1218 (3d Cir. 1987) (affirming dismissal for lack of exhaustion at the time Burkett's case had been determined by the intermediate appellate court and his request for further discretionary review was pending with the Pennsylvania Supreme Court.) On second consideration the Third Circuit deemed the post-conviction delay sufficient to trigger constitutional analysis of the other

Barker factors. Burkett v. Fulcomer, 951 F.2d 1431, 1439, 1445 (3d Cir. 1991).

The reason for the delay was "not the type of purposeful activity proscribed in Pollard, 352 U.S. at 361, the delay attributable to the congested calendar falls into a non-intentional, but negligent area of administrative overload for which the government must assume responsibility." 951 F.2d at 1440. Although not purposeful or oppressive, under Barker, the delay was weighed against the State. Id.

The Third Circuit found that Burkett adequately urged the disposition of his case. Id. at 1441.

The most troubling aspect of the Court of Appeals' Barker analysis is the finding of prejudice. It is one thing to hold that even in the absence of prejudice, an accused who is still presumed innocent may assert a speedy trial claim.

Moore v. Arizona, 414 U.S. 25, 26 (1973)[3] It is another thing to premise a finding of constitutional deprivation to a convict upon post-conviction "prejudice" that, as the dissent observed, "has apparently had no impact whatsoever on the sentence imposed, the amount of time he will spend in custody, or the disposition of his appeal." Burkett v. Fulcomer, 951 F.2d at 1451 (dissent). The bases for the finding of prejudice here are merely facts of life consistent with the jury's determination of guilt. Burkett was incarcerated in county jail and was uncertain about the length of his sentence and disposition of his appeal. Id. Impact on his defense

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[3]The continued viability of Moore v. Arizona is pending before this Court in Doggett v. United States, No. 90-857, reported below at 906 F.2d 573 (11th Cir. 1990), cert. granted. 111 S.Ct. 1070 (1991), reh'g. granted, 112 S.Ct. 631 (1991).

was irrelevant since he was not entitled to a new trial.

Other state and federal courts which have applied Barker in the post-conviction setting have uniformly recognized the need to alter the analysis of prejudice. See e.g. Perez v. Sullivan, 793 F.2d 249, 254 (10th Cir. 1986), cert. denied, 479 U.S. 936 (1986) ("The alteration of defendant's status from accused and presumed innocent to guilty and awaiting sentence is a significant change which must be taken into account in the balancing process. Once guilt has been established in the first instance the balance between the interests of the individual and those of society, shift proportionately.") The Court in Perez explicitly declined to find prejudice, for constitutional purposes, in circumstances akin to Burkett's: "We decline to attach Sixth Amendment speedy

trial dimensions to amenities and benefits a convicted felon might receive in one prison but not another." Id. at 257. "Furthermore, the anxiety of an accused is not to be equated for constitutional purposes with anxiety suffered by one who is convicted, in jail, unquestionably going to serve a sentence, and only waiting to learn how long that sentence will be." Id. See also State ex rel. McLellan v. Cavanaugh, 127 N.H. 33, 498 A.2d 735 (1985) (Then state Supreme Court Justice Souter applying Barker analysis, but declining to find constitutional violation where "[n]othing suggests that the defendant will serve so much as a day longer as a result of the delay.")

2. The need for a different approach is even more evident when the delay comes at the appellate stage.

This Court has never considered the question of whether the United States Constitution guarantees a speedy criminal appeal.[4] There is no constitutional requirement that a State provide an appeal at all. "It is wholly within the discretion of the State to allow or not to allow such a review." McKane v. Durston, 153 U.S. 684, 687 (1894). A State which confers a right of appeal is free to do so

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[4]As with sentencing delay, a number of lower federal courts have applied Barker to appellate delay. See e.g. Simmons v. Reynolds, 898 F.2d 865 (2d Cir. 1990); Coe v. Thurman, 922 F.2d 528 (9th Cir. 1990); Harris v. Champton, 938 F.2d 1062 (10th Cir. 1991); Hill v. Reynolds, 942 F.2d 1494 (10th Cir. 1991); contra see e.g. State v. Adkins, 725 S.W.2d 660 (Tenn. 1987), cert. denied, 482 U.S. 909 (1987); State v. Johnson, 363 So.2d 458 (La. 1978) Sands v. Cunningham, 617 F.Supp. 1551, 1566 (D.N.H. 1985).

"upon such terms as in its wisdom may be deemed proper." Id., at 687-88.[5]

"The number of criminal appeals has doubled over the last decade -- a rate greater than the increase in crime, arrests, and trials over the same period."[6] Where the State establishes a system of appeals as of right, it must do so in accordance with the Equal Protection and Due Process Clauses of the Constitution. Griffin v. Illinois, 351 U.S. 12, 20

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[5]All states presently provide defendants some form of appeal from a criminal conviction. Griffin v. Illinois, 351 U.S. 12, 18 (1956) (plurality); Dalton, Taking the Right to Appeal (More or Less) Seriously, 95 Yale L.J. 62, 62 n.2 (1985); Arkin, Speedy Criminal Appeal: A Right Without a Remedy, 74 Minn. L.Rev. 437, 444, n.26 (1990)

[6]Chapper & Hanson, Taking the Delay Out of Criminal Appeals, 27 Judge's J. 7, 7 (1988); see also D. Meador, Appellate Courts: Staff and Process in the Crisis of Volume 138-39 (1974) (criminal appeals in Illinois, Nebraska, New Jersey, and Virginia accounted for 50%-60% of all docketed cases.)

(1956) (plurality); Douglas v. California, 372 U.S. 353, 356-57 (1963); Evitts v. Lucey, 469 U.S. 387, 405 (1985). The Speedy Trial Clause is inapplicable. Consider Harrison v. United States, 392 U.S. 219, 221 n.4 (1968) (petitioner's contention that his right to speedy trial was violated found to be wholly without merit where "[v]irtually all of the delays of which petitioner complains occurred in the course of appellate proceedings and resulted either from the actions of petitioner or from the need to assure careful review of an unusually complex case.")

According to the Third Circuit, "[t]he Due Process Clause thus protects not only against delays in trial, including sentencing; it also guarantees a reasonably speedy appeal if the state has chosen to give defendants the right to [appeal.]" Burkett v. Cunningham, 826

F.2d 1208, 1208 (3d Cir. 1987). A Fourteenth Amendment Due Process Clause analysis differs from a Sixth Amendment Speedy Trial Clause analysis. Although proof of prejudice may not be required under the Sixth Amendment, "proof of prejudice is generally a necessary but not sufficient element of a due process claim." United States v. Lovasco, 431 U.S. 783, 790 (1977). "The Sixth Amendment right to a speedy trial is thus not primarily intended to prevent prejudice to the defense caused by the passage of time; that interest is protected primarily by the Due Process Clause and by statutes of limitations." United States v. MacDonald, 456 U.S. 1, 8 (1982).

In determining the proper remedy for constitutional violations (or, in some instances, determining whether there was a violation at all), this Court has focused

sharply on the prejudicial effect of the challenged conduct on the truth-determining process. See e.g. United States v. Morrison, 449 U.S. 361, 365-367 (1981) (rejecting dismissal of indictment as an appropriate remedy for an intentional interference with the defendant's right to counsel that did not prejudice the defendant); Strickland v. Washington, 466 U.S. 668 (1984) (showing of prejudice to defense is a necessary component of claim of ineffective assistance of counsel); United States v. Valenzuela-Bernal, 458 U.S. 858, 873 (1982) (to establish violation of Sixth Amendment right to compulsory process, defendant must make a plausible showing that deported witnesses testimony would have been material and favorable to the defense); Brady v. Maryland, 373 U.S. 83 (1963) (suppression of exculpatory evi-

dence violates due process only if it is material to guilt or punishment.)

The Court of Appeals did not require any nexus between the delay and the outcome. None was present.[7] Other Courts of Appeals require that a nexus be shown. See e.g. Mathis v. Hood, 937 F.2d 790, 794 (2d Cir. 1991) ("some showing of prejudice to the appeal is necessary for habeas relief.") Where, as here, the delay is attributable[8] to State courts which "are coequal parts of our national judicial

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[7]The inadequacy of the Barker analysis and the Third Circuit's application of it is even more telling in the discussion of appellate delay. See 951 F.2d 1431, 1445-48 (shortening Burkett's term of imprisonment by ten months of the eighteen month appeal disposition period, as a remedy for the trial court's delay in filing an opinion.)

[8]The conclusion of the Third Circuit that the district court's attribution of the delay, in part, to Burkett was "clearly erroneous" is certainly questionable. See Pet. at pp. 35-38.

system and [which] give serious attention to their responsibilities for enforcing the commands of the Constitution[,]" Sawyer v. Smith, 110 S.Ct. 2822, 2831, (1990); the limited scope of the writ of habeas corpus pursuant to 28 U.S.C. § 2254 must be observed.

This Court has emphasized that the scope of habeas corpus is limited by "interests of comity and finality." Teague v. Lane, 489 U.S. 288, 308 (1989); see also Harris v. Reed, 489 U.S. 255 (1989). The Third Circuit's decision impermissibly expands the scope of habeas corpus and is at odds with the purpose of section 2254. "It is axiomatic that federal courts may intervene in the state judicial process only to correct wrongs of a constitutional dimension." Wainwright v. Goode, 464 U.S. 78, 83 (1983); Smith v. Phillips, 455 U.S. 209, 221 (1982) ("Federal courts hold no

supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension.")

Reduced to its essence, the Third Circuit imposed a constitutional penalty against societal interests, as embodied by the unified judicial system of Pennsylvania. For noncompliance with the Pennsylvania Rules of Appellate Procedure (10 month delay in opinion-writing) and for variance from normal local post-trial procedures (nonissuance of briefing schedule by court administrator; delay in transcript preparation--allegedly totaling 29 months) society will be exposed to this dangerous criminal an additional 39 months.

This Court has "stated many times that `federal habeas corpus relief does not lie for errors of state law.' Lewis

v. Jeffers, 497 U.S. ___, ___, [110 S.Ct. 3092, 3102,] (1990); see also Pulley v. Harris, 465 U.S. 37, 41 (1984)." Estelle v. McGuire, 112 S.Ct. 475, 480 (1991). Stripped of it verbiage, the Court of Appeals decision does just that: correct alleged errors in state court procedure of nonconstitutional dimension.

This Court should grant review and enunciate the proper role, if any, of federal courts where state prisoners seek habeas corpus relief based upon post-conviction delay.

CONCLUSION

For the foregoing reasons, amici urge this Court to grant the petition for writ of certiorari.

Respectfully submitted,

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